IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC12-143

CHARLES WHITE
Petitioner

v.

STATE OF FLORIDA
Respondent

Appeal from the Third District Court of Appeal
L. T. Case Number: 3D09-1403

PETITIONER'S BRIEF ON JURISDICTION PURSUANT TO
Fla. R. App. P. 9.030(a)(2)(A)(iv).

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INTRODUCTION

The Petitioner was the Appellant in the lower court and was the defendant in the Circuit Court of The Eleventh Judicial Circuit in and for Miami Dade County, Florida. The Petitioner was convicted of *inter alia*, two counts of first degree murder. The Petitioner's conviction was affirmed on direct appeal to the Third District Court of Appeals. *White v. State*, 3D09-1403, November 17, 2011; 36 Flw D2470 (Fla. 3rd DCA 2011). There are five volumes of the trial transcript not including jury selection. The facts in the record shall be cited as T[vol. no]-[page no.].

STATEMENT OF THE CASE AND FACTS

This is a proceeding for discretionary review of the decision of the Third District in *White v. State*, 3D09-1403, in which the Third District denied a motion for rehearing and clarification on January 4, 2012. The Third District's decision expressly conflicts with this court's decision in *Ventura v. State*, 29 So.3d 1086 (Fla. 2010).

The Petitioner and co-defendant Armond Ray Davis were indicted and charged with *inter alia*, two counts of first degree murder. Prior to the arrest or indictment of either defendant the lead detective in the case (Detective Stroze) was given some information by another detective (Detective Hoadley) [T2-230; T3-360] that led to Detective Stroze interviewing the petitioner at his home. During this interview, Detective Stroze told the petitioner that he had received information from Armond Davis about the petitioner's involvement in a double homicide. At the conclusion of this interview, the petitioner was not arrested. [T2-235-236; T2-364-365].

During the course of his investigation, Detective Stroze put information in the Miami Dade Police Department computer directing that he be notified if the petitioner was arrested or detained by law enforcement. [T3-476]. Approximately one year later, the petitioner was arrested for misdemeanor marijuana possession.[T3-477]. Before being processed on the misdemeanor arrest, the petitioner was taken to detective Stroze at the Miami Dade Police Department where he was interrogated for over twelve hours. [T3-482] . The Petitioner ended up admitting to committing prior burglaries of the home [T3-400] and eventually confessed to being inside the home on the day it was burglarized and the occupants were murdered, although the petitioner said Davis actually committed the murders. [T3- 404-416; T3- 498-499].

The co-defendants were tried separately. During the trial of the petitioner, the prosecution asked Miami Dade Detective Parr if "an investigative lead came in that took you in a different direction?" The Detective answered "yes" and the defense objected. [T2-230-231]. A sidebar conference occurred in which the defense informed the court that the anticipated testimony would create "the unmistakable inference" that "there is out of court information that is not being presented to the jury that led [the detective] to do certain things under Postell…"

[T2-231-232]. The prosecutor then proffered that Detective Parr would answer the question by saying that he received information from the co-defendant Armond Davis. The prosecutor then withdrew the question. The defense requested a mistrial based on the question that had been asked in front of the jury. The motion was denied. [T2-234-235].

Immediately following the denial of the motion for mistrial, the prosecution asked this question: "Whatever you got, information you got from whatever source, I am not asking about that. Where did you go after that?"
The Detective responded that they went to the Petitioner's house. The defense then objected and the court overruled the objection. [T2-235-240].

The prosecution subsequently called Detective Stroze to testify and asked him this question about his conversation with the petitioner at his home: "As you started to explain to him [the petitioner] the reason that you are there, as part of the conversation was there something that came up about where you had gotten your information?" Detective Stroze responded "Yes. It was from Armond Davis." [T3-364-365]. During further questioning, the prosecutor referenced that the detective received information from co-defendant Armond Davis again: "Without telling us specifically what it was that you might have spoken to him at this point, other than the name of Armond Davis did you give him any other name?" [T3-364-366].

The inescapable conclusion from the testimony of both detectives was that they had received inculpatory information from a non-testifying co-defendant. That the prosecution elicited this improper testimony after agreeing to withdraw the question and after the defendant had objected and moved for a mistrial shows that the testimony was purposefully elicited by the prosecutor despite the defense's objection and specific citation to the Third District's decision in *Postell v. State*, 398 So.2d 851 (Fla. 3rd DCA 1995).

The Third District agreed with the Petitioner's argument: "First, White complains that the prosecutor's elicitation of evidence that the source of the investigative lead that caused the detectives to first question him was co-defendant Davis, constituted inferential hearsay that should not have been admitted. We agree, but on the facts at hand, find the error harmless." *White v. State*, 3D09-1403, p. 15, November 16, 2011, internal cites omitted.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review the Third District's decision because it expressly and directly conflicts with this Court's decision in *Ventura v. State*, 29 So.3d 1086 (Fla. 2010), as it applies to the harmless error analysis. In *Ventura*, this court stated: *"We have explicitly rejected the overwhelming evidence test as a proper analysis of harmless error." Id* at 1091.

Ventura requires consideration and specific written findings as to "whether the impermissible comments **contributed** to the conviction…" *Id.* **emphasis original**. The decision of the Third District did not contain specific written findings as required by this court in *Ventura* and instead merely referenced the evidence, which it characterized as "substantial", in affirming the Petitioner's conviction.

ARGUMENT

THE THIRD DISTRICT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *Ventura v. State*, 29 So.3d 1086 (Fla. 2010)

Jurisdiction in this case is proper under Fla. R. App. P. 9.030(a)(2)(A)(iv). The Third District's decision expressly and directly conflicts with this Court's decision in *Ventura v. State*, 29 So.3d 1086 (Fla. 2010).

The trial court admitted testimony from the lead detective that he received a lead about the Petitioner from the co-defendant who was not a witness in the case. The Third District's opinion characterized the evidence constituting the *Postell* violation as *"all the more damaging as it identified as the source White's co-defendant. Indeed the legal assumption that this fact is uncommonly prejudicial and there must be kept from the jury." White v. State*, 3D09-1403, p. 16, November

16, 2011. The opinion however dismisses the violations as harmless error. *White v. State*, *supra* at p. 17.

It is respectfully submitted that the lower court's opinion does not properly apply the harmless error analysis required by *Ventura v. State*, 29 So.3d 1086 (Fla. 2010). In *Ventura*, the court stated: *"We have explicitly rejected the overwhelming evidence test as a proper analysis of harmless error." Id* at 1091.

Ventura requires consideration and specific written findings as to "whether the impermissible comments **contributed** to the conviction…" *Id.* **emphasis original**. ("*We cannot assume that an analysis was conducted or review that which remains hidden behind the written opinion." Id.).* The Third District's opinion holding the *Postell* violation harmless rests almost exclusively on the conclusion that the evidence against White was substantial: *"[C]onsidering the substantial evidence establishing White's guilt, including his detailed admissions, we conclude that the error was harmless under the test stated in Ventura v. State*." *White v. State*, *supra* at p. 17. *Ventura* requires more for a finding of harmless error.

"[*T*]*he harmless error analysis is not an 'overwhelming evidence' test*." *Ventura supra* at 1089, *citing State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986). "*Overwhelming evidence*" as a benchmark for the application of harmless error was specifically rejected by this court in *Ventura*. *Ventura, supra* at 1089.

The harmless error analysis requires that even in circumstances where competent, substantial evidence supports the conviction, the record and appellate opinion must demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. *Ventura supra* at 1090. *See also*, *Rigterink v. State*, 2 So.3d 221, 255-57 (Fla. 2009) *("However, our harmless-error test is not guided by a sufficiency-of-the-evidence, correct-result, not-clearly-wrong, substantial-evidence, more-probable-than-not, clear-and-convincing, or overwhelming-evidence test... We have specifically rejected sufficiency-of-the-evidence approaches through our decision in DiGuilio, and we will not recede from established precedent by, on the one hand, paying lip service to its requirements and then, on the other, employing reasoning that would be clearly contrary to the pertinent legal standard. . . .")*.

The Third District's opinion does not follow the requirements of *Ventura* and *Rigterink*. The decision merely references the "*substantial evidence*" of guilt in the record: *"Nevertheless, considering the substantial evidence establishing White's guilt, including his detailed admissions, we conclude that the error was*

harmless under the test stated in Ventura v. State…" *White v. State*, *supra* at p. 17. There is no discussion or specific written findings as to "*whether the impermissible comments contributed to the conviction…*" *Ventura, supra* at 1091. The paucity of discussion of why harmless error is appropriate, especially since the Third District's opinion characterizes the error as "*uncommonly prejudicial*" leaves the reader guessing at the analysis the Third District may or may not have engaged in. This is impermissible under the holdings in *Ventura*: "*We cannot assume that an analysis was conducted or review that which remains hidden behind the written opinion" Id.*

CONCLUSION

For the foregoing reasons, this court should accept jurisdiction as the record and the lower court's opinion demonstrate that the Third District did not properly apply the harmless error analysis as required by this court in *Ventura*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice was sent by US Mail to the Office of the Attorney General, Assistant Attorney General Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, FL 33131, on February 1, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response to the Petition complies with the form requirement of Rule 1.100(1) of the Florida Rules Of Appellate Procedure. The Response is written in Times New Roman 14 point font.

____
Philip L. Reizenstein, Esq.